APPENDIX A

[Opinion of the United States Court of Appeals for the Second Circuit (May 12, 2010)]

No. 09-2945-PR, 2010 WL 1881036 (2d Cir. 2010)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of May, two thousand ten.

PRESENT: GERARD E. LYNCH,
DENNY CHIN,
Circuit Judges.*

SEAN STEPHEN AND DARYL STEPHEN,

Plaintiffs-Appellants,

v.

JOHN HANLEY, POLICE OFFICER #13199; EDGAR BOURDON, POLICE OFFICER #30988; RLENDEAU, SUPERVISOR; ILIADIS, POLICE OFFICER; BRILL, POLICE

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* At the time of oral argument, Judge Chin was a District Judge sitting by designation. The Honorable Rosemary S. Pooler was originally a member of this panel, but did not participate in the consideration of this appeal. The two remaining members of the panel are in agreement and have determined the matter. *See* 28 U.S C § 46(d); 2d Cir. I.O.P. E; *United States v. Desimone*,140 F.3d 457 (2d Cir. 1998).

OFFICER; COLEMAN, POLICE OFFICER; WHITE, SST., SUPERVISOR; TOOL TEAM, NYC POLICE SERGEANT HERNANDEZ; POLICE OFFICER DEREK DUNSTON; MILLER; CITY OF NEW YORK; AND WARMOUTH, OFFICER,

Defendants-Appellees.

FOR APPELLANTS: DAVID MCGILL (Joseph De Simone, on the brief), Mayer Brown LLP, New York, New York.

FOR APPELLEES: SUSAN B. EISNER (Stephen J. McGrath, Afsaan Saleem, and Caroline Chen, on the brief), for Michael A. Cardozo, Corporation Counsel of the City of New York, New York, New York.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Kiyo A. Matsumoto, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiffs Sean Stephen and Daryl Stephen appeal from a final judgment entered after a jury verdict on their 42 U.S.C. § 1983 claims alleging excessive force in violation of the Fourth Amendment. We assume familiarity with the facts and procedural history, which we reference only as necessary to explain our decision.

Early on July 10, 2002, Sean Stephen and his fourteen-year-old son were sleeping in a Brooklyn apartment. Police officers forcibly entered the premises pursuant to a search warrant. Plaintiffs alleged that the officers used excessive force against them. The jury found in favor of defendants, except that it awarded nominal damages to Daryl Stephen

against defendant Brill. Judgment was entered accordingly.

On appeal, plaintiffs contend that the district court erred by (1) refusing to instruct the jury on a law enforcement officer's affirmative "duty to intervene" to prevent constitutional violations committed by other officers in their presence; (2) declining to excuse two jurors for cause; and (3) overruling three out of plaintiffs' four Batson objections to defendants' peremptory strikes against African-American members of the panel.

With respect to the district court's refusal to give a "duty to intervene" jury instruction, we affirm. We see the issue not as whether a police officer has a duty to intervene, but whether the district court abused its discretion in declining to permit plaintiffs to introduce a new theory of liability at trial. Plaintiffs' fourth amended complaint did not give defendants notice that plaintiffs intended to pursue a "duty to intervene" theory of liability, and thus plaintiffs' proposed jury instruction would have introduced a new claim to the case. In essence, plaintiffs were seeking leave to amend their complaint as trial was about to commence. We find no abuse of discretion in the trial judge's decision to deny plaintiffs leave to introduce a new theory of liability at that late juncture in the proceedings. See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 108 (2d Cir. 2007) (denial of leave to amend reviewed for abuse of discretion).

Although plaintiffs now argue that it was "impossible" for them to identify their specific attackers, and that a "duty to intervene" charge was therefore essential to their ability to recover from defendants, plaintiffs' fourth amended complaint -- which was

drafted by counsel (plaintiffs' prior attorney) -- did not proceed on this theory. Instead, the fourth amended complaint made specific factual allegations regarding each defendant's individual actions -- for instance, it alleged that "defendant Iliadis struck plaintiff Sean Stephen with a baton"; "defendant Hayden struck plaintiff Sean Stephen in his jaw with a closed fist"; and "defendant Miller tightly handcuffed [plaintiff] Sean Stephen . . . and deliberately pushed him into a wall." Plaintiffs alleged no facts in the pleading to suggest that it was difficult to ascertain each defendant's role in the assaults or that they intended to proceed on a "duty to intervene" theory of liability.

Furthermore, while it is true that plaintiffs raised this issue some eight weeks before trial by including a "duty to intervene" charge in their proposed jury instructions, defendants objected to the proposed charge, and neither side brought the issue to the district court's attention until the final pretrial conference, just a few days before the beginning of trial. The trial judge's decision not to permit plaintiffs to introduce a new theory of liability at that point, on the grounds that defendants would be prejudiced by such a late amendment, was well within her discretion.

As for the plaintiffs' argument that certain jurors should have been excused for cause, we note that "[t]he process of empaneling a jury is firmly entrusted to the sound discretion of the trial judge and will not be disturbed absent an abuse of this discretion." United States v. Rubin, 37 F.3d 49, 54 (2d Cir. 1994). The trial judge questioned the two challenged jurors about their potential biases in detail. Based on their responses, she determined that the jurors

could be fair and impartial. Her determinations were not clearly erroneous. In any event, one of the jurors in question was eventually removed from the panel by a peremptory challenge. See Ross v. Oklahoma, 487 U.S. 81, 88 (1988) ("So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated."). As for the other juror, when the district court ruled that it would seat her because "she is fairly committed to try to be fair and impartial and not to make any decision before the evidence is in," plaintiffs' counsel said, "I agree." See United States v. Ragland, 375 F.2d 471, 475 (2d Cir. 1967) ("Failure to object to the composition of the jury has long been held to result in a waiver of the right of the accused to be heard by an impartial jury.").

Finally, with regard to the Batson challenges, a trial court's determination, under Batson v. Kentucky, 476 U.S. 79 (1986), as to the existence of discriminatory intent in the exercise of peremptory challenges -- or the lack thereof -- is a factual determination that should be set aside only if "clearly erroneous." Hernandez v. New York, 500 U.S. 352, 369 (1991). The trial judge questioned defense counsel about their use of peremptory strikes against African-American jurors. She determined that counsel were not motivated by impermissible racial bias. The trial judge was in the best position to assess demeanor and credibility, see United States v. Breen, 243 F.3d 591, 598 (2d Cir. 2001), and we find no reason to overturn her determinations.

We have considered plaintiffs' remaining arguments on appeal and conclude that they are without

merit. For the foregoing reasons, the judgment of the district court is AFFIRMED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
Clerk of Court

APPENDIX B

[Ruling on Plaintiff's Proposed Jury Instruction and Excerpts of Oral Argument in the United States District Court for the Eastern District of New York (June 1, 2009)]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SEAN STEPHEN AND DARYL STEPHEN,
Plaintiffs,

v.

P.O. JOHN HANLEY, P.O. EDGAR BOURDON, SERGEANT JUAN WHITE, P.O. MICHAEL ILIADIS, P.O. TERRANCE BRILL, P.O. PATRICK COLEMAN, P.O. DEREK DUNSTON, P.O. RICHARD MILLER, DETECTIVE JOSE HERNANDEZ,
Defendants.

No. 03-CV-6226 (KAM)

U.S. Courthouse Brooklyn, N.Y.

Jury Selection

TRANSCRIPT OF PROCEEDINGS

BEFORE:

HONORABLE KIYO A. MATSUMOTO, U.S.D.J.

* * *

[Tr. 4] Afsaan Saleem for the defendants.

THE COURT: Good morning.

MS. CHEN: Good morning, Your Honor.

Caroline Chen for the defendants.

THE COURT: Good morning.

All right. We have a few preliminary issues to deal with. One is that when we call the jurors in, we have a panel coming in, I'm going to ask for all of the spectators to sit together towards the back. I don't want to have interaction between anyone who is a spectator and one who may be a juror. So I may have to ask those who are in the back there, if you're not going to be part of the jury selection, and I'm sure you're not, just to move to one side and stay together and not interact with the jurors.

We had, also, an issue about whether or not a jury charge would be given on the failure to intercede. And the Court has reviewed the submission of the parties and the pleadings, the fourth amended complaint, and is prepared to rule that that claim is not going to be part of this case.

The court's require that a failure to intervene claim must be pled with sufficient particularity by naming [Tr. 5] which defendants are allegedly liable for failure to intervene with respect to each particular incident. And that's a case out of Southern District; Atkins versus County of Orange.

Court's have, occasionally, in the circuit, read duty to intervene cause of action into the complaint without granting leave to amend. However, in those instances, those are the cases in which the plaintiff was proceeding pro se, and therefore would be entitled to a more liberal reading of the complaint.

The Second Circuit has approved a District Court's granting leave to amend a complaint that adds a duty to intervene theory of liability after summary judgment was granted in favor of the defendants. And the Court recognizes that the court --

the Second Circuit found no error in the District Court's refusal to consider the plaintiff's excessive force claim that she failed to plead after being granted leave to amend her complaint.

In this case, we've had four amended pleadings, the most recent of which was with counsel. And it-appears to me that that claim has not been sufficiently pled against some of the officers that are before the Court today.

I think the only allegation that even hints is -- about the officers being present, is that on or about July 10th, 2002, at approximately 4:30 a.m., defendants forcibly entered the subject premises pursuant to a search warrant. [Tr. 6] There's nothing else that really suggests a failure to intervene claim. I mean, other than there are officers --defendant officers who entered the premises pursuant to warrant. And the Court does not find that sufficient to state a failure to intervene claim under the circumstances.

Now, the question is whether or not the Court should allowed a pleading at this late date. I will certainly hear from the parties on that, if they wish to be heard orally now. As you know, it is liberal pleading -- under Rule 15, a liberal amendment rule, in fact, the Court can amend after the trial. But my concern is the fact that this comes very late. That the plaintiffs had numerous opportunity to amend their complaint. That they have been represented by counsel all along. And I'm very concerned about the prejudice to the individual defendants named in this case, but I will hear from you if you wish to be heard.

MR. McGILL: Your Honor, may I be heard on that?

THE COURT: Yes.

MR. McGILL: First, I would just note that with respect to this particular issue, defendants were on notice as to the dispute about whether duty to intervene was in this case by no later than, I believe it was April 1st of this year when we proposed our jury instruction on this issue.

Apart from that, defendants had the opportunity to depose our clients for seven hours in this case. And they [Tr. 7] asked extensive questions about where each officer was, what they were doing and what our clients observed.

During the course of the depositions that we took of defendants, we also asked similar questions. In particular, for instance, with Officer Brill, we asked him whether he had ever seen excessive force used and what's he supposed to do when he says excessive force used during the execution of search warrants.

Sean Stephen was asked, you know, why he was suing Sergeant White in this matter. And he said that he was there, he was part of this, he saw what was happening and he did nothing to stop them.

There are similar questions and answers in all of the deposition transcripts. So we would argue if this issue is really about notice, there's really no prejudice to the defendants at this point. They were on notice of this issue during the depositions. And certainly, no later than April 1st of this year when we proposed the jury instruction.

THE COURT: I guess I'm not hearing any explanation as to why you didn't move to amend or to formally make this clear to the defendants, when you're suing individual defendants, and I think they have a right to know what the claims are against them. And the fact that depositions may have been

taken doesn't necessarily solve the problem if counsel are not necessarily aware that there is a claim that [Tr. 8] you're bringing that hasn't been pled in the pleadings.

How are they to know, despite the fact that they have the opportunity to take depositions or to prepare their witnesses for depositions, that this is a claim that they need to be ready to defend?

MR. McGILL: Well, Your Honor, in the fourth amended complaint all of the defendants are alleged to have-violated plaintiffs' constitutional rights. Apart from that, there's some very specific allegations as to certain officers. But for, instance, with respect to Sergeant White and Officer Dunston, there are no specifically detailed allegations regarding the use of excessive force.

If defendants had the view that there had to be such specific allegations as to each defendant, then why are those defendants still in the case? Why didn't they move to dismiss those defendants. I think defendants a little disingenuous to say that they were not on notice as to claims apart from those specifically pled allegations of excessive force because there are other defendants in this case.

And in addition, Sergeant White, in particular, is alleged in the fourth amended complaint to be -- to have acted in his capacity as supervisor during the day in question.

THE COURT: The last complaint, the fourth amended complaint, was filed by counsel. And it was, `I believe, if I'm not mistaken, up to 2006. [Tr. 9]

MR. McGILL: I don't have the particular date in mind, Your Honor. Our predecessor counsel did file that complaint.

THE COURT: Here we are three years later, on the day of trial, and, you know, the complaint hasn't been amended, frankly. I think that it does raise, in the Court's view, a question of dilatory action, delay, prejudice, and all of those other factors that militate against an amendment.

You know, I understand what you're saying. That in your view this was -- may been vetted. Now, I'm not sure that's the case. I haven't read all the depositions. I cannot say and charge the defendants with notice of claims that have not be pled. Especially if, given that there are four amended complaints, certainly somebody could have raised the issue at some point prior to today.

MR. McGILL: Well, Your Honor -- I'm sorry to interrupt, Your Honor.

THE COURT: Go ahead.

MR. McGILL: I just wanted to reiterate that defendant were put on notice certainly no later than April 1st.

THE COURT: Do you have something in writing saying that we are charging your clients, your individual clients, with failure to intervene? Is there something to that effect, or are they just to infer notice based on your questions? [Tr. 10]

MR. McGILL: No, Your Honor. The proposed jury instruction itself makes very clear that we were alleging defendants to be held liable on a serious duty to intervene as of April 1st of this year. That's two months ago.

THE COURT: They didn't agree to it and the dispute arose because they said it's not in the complaint.

MR. McGILL: Understood, Your Honor. But if the issue is noticed, there's no question they had notice as of April 1st. And if they contend that they didn't have sufficient discovery on the issue, you know, we would have been amendable to having a continuation of the plaintiffs' depositions at that point in time.

THE COURT: Well, as I recall, it was the plaintiffs who were very eager to get a trial date, a trial date that was going to be sooner rather than later. I'm completely supportive of that given the age of this case, but let me hear from the defense, if I may, on this.

MR. SALEEM: We agree with Your Honor's ruling. By the time the issue had come up, discovery had dined. I don't see how defendants could have been put on notice when it's several months before the end of the case. As Your Honor correctly points out, it was not pleaded in the complaint.

And that's the whole purpose of a complaint, is to put the parties on notice.

There are nine individual defendants, they were not [Tr. 11] put on notice that this is a claim against them. The individual complaint also alleges specific acts against each of the defendants. It does not state that this individual -- any of the individual defendants were present and observed a violation of constitutional rights against other defendants. Sergeant White is a supervisor. Yes, that's his role as a supervisor, to supervise.

So we just agree with Your Honor's ruling. And I don't see how plaintiffs can even make an argument that there's no prejudice when the discovery had been closed for several months when this issue first came to light during the pretrial submissions.

MR. McGILL: Your Honor, if I might just be heard briefly in response?

THE COURT: Yes.

MR. McGILL: Just, again, I think with respect to the issue of prejudice, defendants have all stipulated that they were present at the apartment. So they were on notice as of July 2002 that they were there. They knew they were. That's not an issue in this case anymore. So for them to claim that they had no notice that there are allegations that they were present, I mean, it just doesn't ring -- it rings hollow to me, Your Honor.

I think, again, Mr. Saleem indicated there were specific allegations against all the defendants. That's just [Tr. 12] not the case. It was specific allegations against seven of the defendants, but two other people were included in that complaint. And all of the defendants were alleged to have violated constitutional rights of defendant.

THE COURT: You just left the burden on the defendant saying that with respect to the other two defendants against who specific allegations were made, it's now their burden to dismiss. No. It's your burden to prove against each and every one of the defendants and to prove that they violated the plaintiffs' constitutional rights.

I'm just not convinced or persuaded that mere presence is sufficient to establish a failure to inter-

vene, because there is nothing about that in the complaint. I've looked. We've had four amendments. So, I'm just -

MR. McGILL: Your Honor, just on the issue of prejudice here, though, I think if you look at defendants submission to the Court on this issue, they allege, generally, that, you know, they didn't have opportunity to take discovery, but they really couldn't identify a single additional question that they would have asked the plaintiffs, and they are both going to testify in this case as the third parties. They'll have the opportunity to cross-examine these witnesses. I just don't see any degree of prejudice if we're allowed to amend at this juncture.

THE COURT: Mr. Saleem, do you want to respond, or [Tr. 13] Ms. Chen? They're saying that, basically, you've had all the discovery you'd need to defend against a failure to intervene claim.

MR. SALEEM: That's a ludicrous assertion, Your Honor. Again, the plaintiffs asked several questions of our officers in depositions. Questions like did they go to high school? There's no claim in the case that the officers didn't go to high school. So saying that just because questions could have been asked or were asked at a deposition somehow puts us on notice is not a very good argument, Your Honor.

I think Your Honor has ruled the Supreme Court recently issued last month about how the pleadings have to be construed, and they just can not make this argument this late in the game. It's complete prejudice.

THE COURT: All right. Well, the Court, as I stated, finds that the failure to intervene claims have not been sufficiently alleged so as to put the defen-

dants on notice. And that there has been far too much time delay at this late juncture to grant an amendment.

I believe that there would be undue prejudice to the individual defendants to try to defend against these claims at this time. So the Court is not going to read something into the pleadings that is not there. Nor will the Court, at this late date, grant an amendment.

MR. KADISH: Right. And just so we're clear, [Tr. 14] initially, the question was jury instruction. It seemed that the Court gave us a little room with respect to amending the complaint even at this late date. I assume that you're ruling that we can not amend.

THE COURT: I understood that the next step, since I had ruled against the instruction, would be, Well, then let us amend. So I thought I would I take care of that now.

MR. KADISH: Okay.

THE COURT: So that the parties have a fair notice of how this trial is going to proceed and what the proper scope of inquiry will be with respect to the witnesses, and what charges are being brought and which charges need to be defended. So, yes, it was a two step process with respect to the instruction issue and with respect to the amendment of the pleading.

MR. McGILL: Your Honor, if I might just suggest one other alternative --

THE COURT: Yes.

MR. McGILL: -- sensitive to the Court's timing of things. I just wanted to suggest that one possibility would be for the Court to reserve on this issue un-

til the charging conference and see if we're able to prove, if we're able to make the proper evidentiary showing that these specific defendants were present during specific acts of excessive force, did nothing to stop it when having the right and the [Tr. 15] ability to do so. I think that that would be a fair compromise under the circumstances.

THE COURT: Well, the only concern I have is if, in the process of doing that, the defendants have one arm tied behind their back because they haven't had the opportunity to take sufficient discovery on this issue. It just wouldn't be fair to make a record of that and then say well, based on this record we should now amend, if the defendants haven't had the opportunity or the ability to defend.

MR. McGILL: I understand the issue, Your Honor, but the defendants have knowledge of where they were during the incident. That's within their particular knowledge, Your Honor. They should know where they were during the event. So that's not really an issue for discovery.

THE COURT: I'll tell you what can do. I'm standing by my ruling. If you want to, after the evidence is in, raise the issue again, I'll hear from you. But I'm not inclined to grant it. I still think there's a high level of prejudice to the defendants at this point.

MR. McGILL: Thank you, Your Honor.

THE COURT: Now, with respect to the jury selection, as we discussed, we're going to seat 18 prospective jurors. Each side will have the opportunity to strike three peremptory jurors. I read through the voir dire. I think that most of it is acceptable. What I tried to do is combine the two

APPENDIX C

[Excerpts from the Trial Transcript of Proceedings in the United States District Court for the Eastern District of New York (June 1, 2009)]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SEAN STEPHEN AND DARYL STEPHEN,
Plaintiffs,

v.

P.O. JOHN HANLEY, P.O. EDGAR BOURDON, SERGEANT JUAN WHITE, P.O. MICHAEL ILIADIS, P.O. TERRANCE BRILL, P.O. PATRICK COLEMAN, P.O. DEREK DUNSTON, P.O. RICHARD MILLER, DETECTIVE JOSE HERNANDEZ,
Defendants.

No. 03-CV-6226 (KAM)

U.S. Courthouse Brooklyn, N.Y.

TRANSCRIPT OF PROCEEDINGS

BEFORE:

HONORABLE KIYO A. MATSUMOTO, U.S.D.J.

* * *

[Tr. 20] reminders of what happened to them, they will be able to tell you who did what to them on that date. They will be able to tell you which of the defendants stood by and watched as the abuse is happening and did nothing to stop them.

MR. SALEEM: Objection.

THE COURT: Sustained. The jury will disregard the last comment about the defendants standing by and doing nothing to stop it. Please disregard that statement.

MR. McGILL: May I approach?

THE COURT: Yes, you may.

(Side-bar conference held on the following page.)

[Tr. 21] (Side-bar held.)

MR. McGILL: Your Honor, my understanding of your ruling from earlier today was that we would have the opportunity to make an evidentiary showing that defendants' proposition about this issue with the police, that you were reserving final ruling on the issue until the charge conference.

THE COURT: No. I ruled that that claim is not in the case and that if -- and that you are not to introduce evidence. You should not be introducing evidence regarding this claim if -- and referring to it as though there is such a claim.

If there's evidence, at the end of the day, in the record, that demonstrates that -- you know, I'm not comfortable with having this in the record at all, because I ruled that this is not part of your case and that you could make -- you could bring your motion or your application, but -- to amend, but that I had not granted your application to amend. And I'm not going to allow you to put in evidence on this claim that is not in the case in hopes of then moving to amend the complaint after trial.

MR. McGILL: I don't understand how I'm going to be able to tell the story of what happened without saying which officers were where when this thing happened.

THE COURT: Well, you can say which officers were [Tr. 22] where. You just are not allowed to argue that these officers did nothing and failed to intervene. That is not in the case.

MR. McGILL: So you're saying --

THE COURT: Your statement to the jury that these officers stood by and did nothing is not an appropriate statement.

MR. SALEEM: One other thing, Mr. McGill also mentioned particularly the fact that the officers didn't -- didn't offer any medical treatment. There's no denial of medical treatment claim. That's something that he pled separately. I take exception to him discussing that. There's no claim, there's no separate claim of denial of medical treatment.

I also take exception to the fact that with regard to the stipulation that the timing of the search warrant is not a claim the plaintiffs are claiming in this case. I take exception to that. They don't mention the time of the search warrant.

MR. McGILL: Your Honor, their refusing to provide medical attention clearly goes to damages and clearly goes to the trauma that the defendants didn't allow them medical attention. This is all part of the trauma that was sustained.

MR. DeSIMONE: It goes to punitive damages, as well, Your Honor. The egregious nature of it. They wouldn't just make a phone call. They say just put a band-aid on it. They

APPENDIX D

[Excerpts from the Trial Transcript of Proceedings in the United States District Court for the Eastern District of New York (June 5, 2009)]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SEAN STEPHEN AND DARYL STEPHEN,
Plaintiffs,

v.

P.O. JOHN HANLEY, P.O. EDGAR BOURDON, SERGEANT JUAN WHITE, P.O. MICHAEL ILIADIS, P.O. TERRANCE BRILL, P.O. PATRICK COLEMAN, P.O. DEREK DUNSTON, P.O. RICHARD MILLER, DETECTIVE JOSE HERNANDEZ,
Defendants.

No. 03-CV-6226 (KAM)

U.S. Courthouse Brooklyn, N.Y.

TRANSCRIPT OF PROCEEDINGS

BEFORE:

HONORABLE KIYO A. MATSUMOTO, U.S.D.J.

* * *

[Tr. 971] THE COURT: Good morning.

Have a seat everybody.

THE COURT: Are you ready to start, counsel?

MS. SANTIAGO: Yes.

THE COURT: Okay. I think that what I'd like to do is just go through some of these issues. It ap-

pears I have reviewed the plaintiff's June 4th submission in which they ask again to have reconsideration of the Court's ruling regarding the failure or the duty to intervene instruction.

Now, this is the Court's view in terms of reconsideration. As you know, you have to point to case law or facts that were overlooked that couldn't have been presented earlier.

My concern is this. The plaintiffs argue that in a prior pleading there were specific allegations that particular officers were present while another officer allegedly engaged in excessive force against one of the plaintiffs.

Ultimately, however, that complaint was amended and superseded. The effect of an amendment is to supersede and to [Tr. 972] present a new set of claims and allegations and the governing complaint in this case is the fourth amended complaint. I've looked through that complaint and there are no facts that specifically alert the defendants to the plaintiffs' view that certain defendants were present, had the opportunity to observe a violation of a constitutional right and failed to intervene to stop it.

The-cases that the plaintiffs cite, at least, are articulate facts that would notify the defendants that they are being accused or charged with a failure to intervene, either because facts allege that they were present or that they were involved or that they were within the proximity of the alleged constitutional violation and failed to intervene.

Now, the mantra is not failed to intervene, those words don't have to appear in the pleading, but the facts have to notify the defendant that it is alleged

that they were present and had the opportunity to, and the ability to observe.

The defendants have objected from the-time. they were first advised via the jury instruction in April that the plaintiffs were proceeding on that theory. It is undecided in the Second Circuit whether or not it has to be pled as a separate cause of action, and I appreciate that the plaintiffs cited cases -- district court cases where the claim wasn't specifically pled as a separate cause of action, but as I [Tr. 973] said, in those cases the facts supported and gave sufficient notice to the defendants that they were being -- that they had faced exposure for a failure to intervene, and if one looks again at the fourth amended complaint which superseded whatever allegations might have been made against specific allegation thee is a total absence of any appropriate notice.

Now, the plaintiffs' fourth amendment complaint was filed with counsel -- with the assistance of counsel in February of 2006. Mayer Brown substituted in, in February 2007. Even after the plaintiffs proposed the jury instructions some time in April after discovery had been closed and when we were in the process of preparing the final pretrial order, the plaintiffs did not attempt to amend the pleadings.

Now, the pleadings, as you know, define what is relevant in a case. It defines the scope of discovery and it defines what can come in at trial.

Now, I grant you, you have cited some discovery depositions where the parties may have explored or touched upon the issue of a failure to intervene, and some evidence may have come in at trial regarding that issue, but ultimately, it appears to me that it

would be not only prejudicial to the defendants to bring the claim and to expose them to this liability, but there has just been no adequate explanation as to why something wasn't done to amend the [Tr. 974] pleadings -- not to specifically state I am claiming that you failed to intervene, because we don't know whether the Second Circuit will require a separate cause of action, but some facts to notify each defendant what he or she -- what he did with respect to a failure to intervene charge.

There has been no amendment to specified facts as to each defendant, that they were present, or in a position to observe. So very reluctant, given the prejudice, given the delay, given the lack of any reasonable explanation for delay. I cannot speculate at this time what the defendants might have done differently -- whether there are other witnesses that they might have deposed.

We have evidence or information and I'm just relying on what came in in the court record, but other officers were there. Officer Dunston's supervising officer, a sergeant Matthews, an Inspector Marino were present. I don't know whether the defense trial strategy would have changed had they known that there were some exposure for those defendants. It's hard for me to speculate, but I'm concerned that it's just too late, and there is a pleading that doesn't support instruction and for that reason, I am inclined to deny this instruction because I think it's at this point inappropriate.

MR. KELBLEY: Your Honor, may I be heard?

THE COURT: Absolutely.

MR. KELBLEY: I appreciate the position you are in. [Tr. 975] We have a recent supplemental to

yesterday's letter motion and we have good cause. At the times our letters were written we were not in possession of the underlying complaint in Anderson v. Brainon (ph) because they were out in the national archives. We took a look at them an we can now represent to the Court that these complaints contained no separate claims regarding the duty to intervene. They are not pro se. They were represented by Simpson Thatcher the entire way.

As in the instant case the Brainon plaintiffs alleged that law enforcement officials violated their constitutional rights under the Fourth Amendment by using exceptional force interrogatory evidence. As in the instant, there were several amended complaints filed by counsel. No separate claims for duty to intervene was ever pled.

As in the instant case, the plaintiffs first addressed the duty to intervene charge in a proposed jury instruction, just as we did, and as in the instant case, the trial court denied plaintiffs' request to charge regarding the duty to intervene.

THE COURT: Well, let's just stop you right there.

One: Why wasn't this presented to me before today?

The pleadings presumably were available to you and accessible to you over the seven years this case has been pending or six years. Forgive me.

Second of all, I don't know still, as I sit here [Tr. 976] now, whether those complaints alleged specific facts, whether or not it was categorized as a separate claim and again, that has not been decided by the

circuit, but I don't throw whether those facts in those pleadings were alleged to give somebody notice that -

MR. KELBLEY: I understand. I apologize for the delay. We didn't really -- we briefed this issue and we cited the case. We thought we had enough other cases with complaints that didn't separately plead, that were adequate, and it is very difficult to find. We had to go to the national archives to get it.

What I want to continue with, just briefly and then I'll get back to your point, was that on appeal the Second Circuit found the trial court had erred in refusing to include in its charge to the jury plaintiff's proper instruction, and said it was prejudicial error and remanded the case for a new trial, essentially, and so, I'm concerned based on these facts that we might have a similar situation here.

I have the complaints for Your Honor, and obviously we defer to Your Honor, if you'd like to review them, and you know, if you see in these complaints the kinds of allegations you think that would put someone on notice. You know. Obviously, you know, that would be a different situation. We don't personally see them but we have them here for your examination.

[Tr. 977] THE COURT: Well, have you provided the defense with copies of everything?

MR. KELBLEY: I actually only have one copy.

THE COURT: Well, I am not taking -- well, we can make a copy for the defendants but it is really -- delay equals prejudice in my mind. I understand that the allegations are very serious and I appreciate that Mr. Sean and Daryl Stephen have very serious allegations, but I also appreciate the defendants are

being charged with these very serious allegations, and my concern is that to present something to me now and to the he defendants, something I have not yet seen and the defendants haven't yet seen, it is very prejudicial.

MR. KELBLEY: I understand.

THE COURT: I will be happy to look at your submissions, but I want to make sure the defendant has had an opportunity. I really real think at this late date, honestly, I think it is very prejudicial. I will hear from the defense before I move forward.

MS. SANTIAGO: Thank you, Your Honor.

We would absolutely concur with that. The fact that we have been blind sided the with this at, literally, the eleventh hour, the day that we expect to sum up in this case clearly demonstrates how we've been prejudiced.

Certainly, there, Your Honor has rightfully pointed [Tr. 978] out that there are no factual allegations contained in the Fourth Amended complaint which would put us on -- the defendants on notice that this was a theory of liability that was going to be pursued by the plaintiffs.

While I have also looked at the plaintiffs' submission with respect to the Anderson V Brainan case, and I will just like to point out that at no time does the Second Circuit say in that case that facts regarding a failure to intervene claim does not have to be pled in a complaint.

The Court notes -- Second Circuit notes the case law establishing that officers do have an affirmative duty to intervene. However, with any constitutional violation alleged they have an affirmative duty not to

engage in the complaint conduct. For example, officers have an affirmative duty not to arrest people on less than probable cause, and certainly, that is a cause of action that must be pled in a complaint, if not use the term false arrest, but certainly, facts that would give the other side notice that that was a claim that was going to be pursued, and that is completely absent in this case. It was not in the complaint, it was not in the joint pretrial order, and certainly, previously, because of position certain parties have taken in the joint pretrial order, Your Honor has made the parties bound by that, and we would ask that you continue to do so, for the reasons that I have just mentioned, as well as extreme prejudice.

[Tr. 979] THE COURT: I mean, if anything, the prior complaint that you rely on, the March 17, 2004 complaint, in which the plaintiffs point out that they alleged that Defendant Miller saw excessive force and Defendant Dunston watched excessive force being used against the plaintiffs, that may have been adequate, but it was superseded by the fourth amended complaint, and that was dropped out. So, if anything, it had the effect of-putting plaintiffs on notice that they weren't going to be facing exposure or failure of their duty to intervene.

If anything it would have lulled the defendant into thinking: All right. Well, that's not a theory under which we face exposure. And again, you know, for me to try to -- it's prejudicial, I have no doubt, and I do believe that the opening statement could have been different. Had they known, I believe, the witnesses that they might have called would have been different. Indeed, their summations, which are going to be given today, are probably going to be dif-

ferent based on that. So I really have to say, counsel, that it's just too late in the game.

MR. KELBLEY: Okay. I just wanted to note our objection, for the record.

THE COURT: All right. Duly noted.

We had some other issues. I think what I'll do is I don't think the plaintiffs raise any other issues of great

* * *

[Tr. 1198] defendants had less intrusive alternatives available, for the defendants need only have to have acted within a range of conduct identified as reasonable.

If you find that the amount of force used was greater than a reasonable person would have employed, the plaintiffs will have established the claim of loss of a federal constitutional right.

23. Element three: Proximate cause.

The third element which each plaintiff must prove is that the acts of a particular defendant who you are considering were a proximate cause of the injuries sustained by the plaintiff. Proximate cause means there must be sufficient causal connection between an act or omission of a defendant that deprived a plaintiff of his federal right and any injury or damage sustained by the plaintiff.

An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury; that is, if the injury or damage was a reasonably foreseeable consequence of the act or omission. If an injury was the direct result or a reasonably probable consequence of a particular act or

omission, then that injury was proximately caused by such act or omission.

In other words, if a defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act [Tr. 1199] or omission is a proximate cause.

In order to recover damages for any injury, each plaintiff must show by a preponderance of the evidence that such injury would not have occurred without the wrongful conduct of the defendant that you are considering.

A proximate cause need not always be the nearest cause either in time or in space. In addition, there may be more than one proximate cause of an injury or damage. Many factors or the conduct of two or more people may operate at the same time, either independently or together, to cause an injury.

With respect to intent.

It is not necessary to find that the defendant you are considering had any specific intent to deprive the plaintiffs of their constitutional or civil rights in order to find in favor of a plaintiff as to that defendant. Regarding intent, the plaintiffs need only prove that the defendant you are considering intended the actions which resulted in the violations of the plaintiff's rights or that he acted recklessly in that regard. An act is intentional if the actor knows he or she is doing it; that is, if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other innocent reason. An act is reckless if it is done in conscious disregard of its known probable consequences.

APPENDIX E

[Excerpts from the Fourth Amended Complaint and Jury Demand (Feb. 4, 2006)]

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SEAN STEPHEN AND DARYL STEPHEN,
Plaintiffs,

against

P.O. JOHN HANLEY, SHIELD NO. 131966, P.O. EDGAR BOURDON, SHIELD NO. 30988, SERGEANT JUAN WHITE, P.O. MICHAEL ILIADIS, P.O. TERRANCE BRILL, P.O. STEVEN HAYDEN, P.O. PATRICK COLEMAN, P.O. EKEYTHIA DUNSTON, P.O. RICHARD MILLER, DETECTIVE JOSE HERNANDEZ,
Defendants.

No. 03-CV-6226 (DGT)(LB)

FOURTH AMENDED COMPLAINT AND JURY TRIAL DEMAND

Plaintiffs, SEAN STEPHEN and DARYL STEPHEN, by their attorney, ALAN D. LEVINE, ESQ., complaining of the defendants herein, respectfully allege as follows:

* * *

[Compl. 4] 21. On or about July 10, 2002, at approximately 4:30 A.M., defendants forcibly entered the subject premises pursuant to a search warrant.

* * *

23. At the time the individual defendants entered into subject premises as aforesaid, they were acting under the command of defendant WHITE.

* * *

[Compl. 5] 31. The individual defendants violated plaintiff SEAN STEPHEN's right to be free from illegal searches and seizures and his right to the due process of law guaranteed to him by the fourth and fourteenth amendments to the Constitution of the United States in that the individual defendants, acting under color of state law, without any cause or provocation whatsoever, illegally entered the premises where he lived with members of his family and brutally and severely beat and humiliated him.

* * *

[Compl. 6] 43. In addition to the improper, intentional and unprovoked physical injuries he had inflicted upon him as a result of the aforementioned batteries, plaintiff DARYL STEPHEN was also compelled to be a witness to the improper, intentional and unprovoked physical injuries inflicted upon his father, plaintiff SEAN STEPHEN.

44. The individual defendants violated plaintiff DARYL STEPHEN's right to be free from illegal searches seizures and his right to the due process of law [Compl. 7] guaranteed to him by the fourth and fourteenth amendments to the Constitution of the United States in that the individual defendants, acting under color of state law, without any cause or provocation whatsoever, illegally entered the premises where he lived with members of his family and brutally and severely beat and humiliated him.

APPENDIX F

[Excerpts from the Proposed Jury Instructions (Apr. 7, 2009)]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SEAN STEPHEN AND DARYL STEPHEN,
Plaintiffs,

v.

POLICE OFFICER JOHN HANLEY, SHIELD NO. 13166, POLICE OFFICER EDGAR BOURDON, SHIELD NO. 30988, SERGEANT JUAN WHITE, POLICE OFFICER MICHAEL ILIADIS, POLICE OFFICER TERRANCE BRILL, POLICE OFFICER PATRICK COLEMAN, POLICE OFFICER DEREK DUNSTON, POLICE OFFICER RICHARD MILLER AND DETECTIVE JOSE HERNANDEZ,
Defendants.

No. 03-CV-6226 (KAM)

ECF CASE

PROPOSED JURY INSTRUCTIONS

* * *

Requested Jury Instruction No. 22

(Duty to Intervene)

Plaintiffs submit that, in accordance with the authority set forth below, the following instruction is necessary to ensure that the jury understands that each Defendant need not be found to have used force against one of the Plaintiffs in order to be found liable. It is enough that they witnessed the use of excessive force and did not intervene. This is critical to

Plaintiffs' case, particularly given Plaintiffs' contention that Defendants' attacked them without provocation in the middle of the night. Plaintiffs further believe that, under the circumstances of this case, Defendants should be held joint and severally liable. Finally, Plaintiffs believe that a fair reading of the Fourth Amended Complaint makes clear that Plaintiffs' alleged other officers were present for each instance in which excessive force was utilized, and that the duty to intervene is inherent to section 1983 claims, which were specifically plead. See Fourth Am. Cmplt. at ¶¶ 31, 43, 44.

Defendants' object to the charge on the ground that this allegation was not specifically plead in the Complaint and did not give notice to Defendants. Each allegation in the Complaint alleges physical contact by certain defendants and not any allegations that other officers witnessed any unlawful conduct. Each defendant is said to have either "kicked," "pushed," "struck," or "threw" plaintiffs. There is no mention that the defendants observed unlawful conduct or were in a position to intervene. Defendants object to the claim that they should be held jointly and severally liable as each defendant has to have been found to have personal involvement in order to be liable to plaintiffs.*

In order to hold a defendant liable for the use of excessive force pursuant to section 1983, the Plaintiffs need not demonstrate that the Defendants actively participated in using force against the plaintiff. Instead, if a Defendant was present and failed to

---

* Defendants will submit a proposed jury instruction regarding the duty to intervene if the Court determines that this is a viable claim.

intervene to prevent other Defendants from infringing on the constitutional rights of plaintiff, he is liable under section 1983 if you find that he:

(1) Had reason to know that excessive force was being used;

and

(2) Had a realistic opportunity to intervene to prevent the harm from occurring.

Authority: *Anderson v. Branen*, 17 F.3d 552, 557-58 (2d Cir. 1994) (ordering new trial on basis of trial court's refusal to issue a jury charge on the duty to intervene); *O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir.1988); *Byrd v. Clark*, 783 F.2d 1002, 1007 (11th Cir.1986); *Webb v. Hiykel*, 713 F.2d 405, 408 (8th Cir.1983); *Bruner v. Dunaway*, 684 F.2d 422, 426 (6th Cir.1982), cert. denied, 459 U.S. 1171, 103 S.Ct. 816, 74 L.Ed.2d 1014 (1983); *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir.1972)*Yang v. Hardin*, 37 F.3d 282 (7th Cir. 1994).

APPENDIX G

[Stipulation (May 26, 2009)]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SEAN STEPHEN AND DARYL STEPHEN,
Plaintiffs,

v.

POLICE OFFICER JOHN HANLEY, SHIELD NO. 13166, POLICE OFFICER EDGAR BOURDON, SHIELD NO. 30988, SERGEANT JUAN WHITE, POLICE OFFICER MICHAEL ILIADIS, POLICE OFFICER TERRANCE BRILL, POLICE OFFICER PATRICK COLEMAN, POLICE OFFICER DEREK DUNSTON, POLICE OFFICER RICHARD MILLER AND DETECTIVE JOSE HERNANDEZ,
Defendants.

No. 03-CV-6226 (KAM)

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between Plaintiffs, Sean and Daryl Stephen, and Defendants P.O. John Hanley, P.O. Edgar Bourdon, Sergeant Juan White, P.O. Michael Iliadis, P.O. Terrance Brill, P.O. Patrick Coleman, P.O. Derek Dunston, P.O. Richard Miller and Detective Jose Hernandez, by their respective undersigned counsel, as follows:

On July 10, 2002, Defendants Juan White, Michael Iliadis, Terrance Brill, Patrick Coleman, Derek Dunston, Richard Miller, and Jose Hernandez (collectively, the "ESU Team") were present in apartment 2L at 1316 Sterling Place during the execution of a search warrant. Defendants John Hanley and

Edgar Bourdon entered apartment 2L at 1316 Sterling Place sometime after the ESU Team secured Sean and Daryl Stephen.

Dated: New York, New York

May 26, 2009

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Attorneys for Plaintiffs

APPENDIX H

[Complaint in *Campbell v. Lynch* (N.D. Ga.) (May 24, 2006)]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ROME DIVISION

WILLIE MAE CAMPBELL,
Plaintiff,

v.

MICHAEL LYNCH AND DUSTIN CLAY,
Defendant.

Civil Action File No. 4:06-CV-114-HLM

COMPLAINT

The Plaintiff, WILLIE MAE CAMPBELL, by her attorney, BOBBY LEE COOK, complaining of the Defendant herein alleges as follows:

FIRST CAUSE OF ACTION

1. This action arises under the Fourth and Fourteenth Amendments to the United States Constitution under Title 42 USC § 1983.

2. This Court has jurisdiction of this action pursuant to Title 42 USC § 1983.

3. At all times hereinafter mentioned, the Plaintiff was and still is a citizen of the United States of America residing in Cedartown, Polk County, Georgia.

4. At all times hereinafter mentioned, Defendants Michael Lynch and Dustin Clay were and still are employed by the Polk County, Georgia, Police

Department as police officers. Both Defendants are residents of Polk County, Georgia.

5. At all times hereinafter mentioned, each and all of the acts of the Defendants alleged herein were done by the Defendants under the color and pretence of the statutes, regulations, customs and usages of the State of Georgia and under the authority of their office as heretofore alleged in the Police Department of the County of Polk, State of Georgia.

6. At all times relevant, the Plaintiff was located in her private dwelling in Cedartown, Georgia, and was not violating any law of the State or Municipal ordinance of the Municipality of Cedartown.

7. At all times relevant, the Plaintiff had not consented to allowing or permitting said Defendants to enter her dwelling, and no exigent circumstances or lawful authority existed that would authorize their entry.

8. On or about December 7, 2005, the Defendants demanded entry to Plaintiff's dwelling and physically broke open the door without the Plaintiff's consent and over Plaintiff's protest.

9. At the above mentioned date, time and place and upon entering said premises, the Defendants seized Plaintiff and handcuffed her, twisting and jerking her left arm in such a manner that resulted in serious and permanent injuries thus causing her to be hospitalized.

10. As a result of the violent and unlawful acts of the Defendants, Plaintiff has incurred hospital and doctor bills in excess of $25,000.00, and has suffered permanent injuries and extreme pain and suffering.

11. The aforesaid acts were done by the Defendants with the purpose and intent of depriving Plaintiff of her right to be free from unreasonable seizure secured to her under the Fourth Amendment to the United States Constitution and of her right not to be deprived of liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

12. That solely as a result of the unlawful acts of the Defendants herein, Plaintiff sustained serious personal injuries and has suffered great mental anguish.

13. That solely as a result of the Defendant's actions, Plaintiff has sustained damages in the sum of $500,000.00.

SECOND CAUSE OF ACTION

14. That the Plaintiff represents and reiterates each and every allegation in Paragraphs 1-13 of the Complaint as if more fully set forth herein.

15. The acts, conducts and behavior of the Defendants were performed knowingly, intentionally and maliciously, by reason of which the Plaintiff is entitled to punitive damages in the sum of $1,000,000.00.

WHEREFORE, Plaintiff demands Judgment against the Defendants herein in the sum of $500,000.00 in the first cause of action and $1,000,000.00 in the second cause of action, together with the costs of this action and attorneys' fees and such other and further relief as may be just and mete.

Plaintiff demands a trial by jury.

This 22 day of May, 2006.

respectfully submitted,

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Attorney for Plaintiff

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